A

PRINCIPAL SALUTE (M) SDN BHD

v.

RHB BANK BHD

B

HIGH COURT MALAYA, KUALA LUMPUR
HARMINDAR SINGH DHALIWAL JC
[CIVIL SUIT NO: S7-22-1226-2006]
12 OCTOBER 2009

C ***BANKING:*** *Cheques - Forged cheques - Signature of one of the authorized signatories on cheques different from specimen signature - Other authorised signatory charged in Court with cheating and had admitted to forgery - Whether signature on the disputed cheques were forged*

D ***BANKING:*** *Banker and Customer - Duty of Banker - Duty of customer - Bank to honour customer's cheques in accordance with mandate on instructions - Bills of Exchange Act 1949, s. 24 - Whether relevant - Customer to refrain drawing a cheque which may facilitate fraud or forgery - Duty to inform bank of any forgery as customer becomes aware - Whether in absence of contract to the contrary, no duty for customer to*
E *inspect bank statements to ensure account properly maintained by bank*

BANKING: *Cheques - Payment of cheques - Whether cl. 18 of the defendant's Rules and Regulations Governing Current Accounts relieved the defendant from payment on the forged cheques - Whether cl. 18*
F *reversed onus on plaintiff to verify statements and to inform defendant of errors - No reference to forgery or fraud in cl. 18, only on errors - Whether cl. 18 not sufficiently explicit to encompass cases of fraud or forgery*

The plaintiffs were customers of the defendant bank. They
G maintained a current account at the defendant's Jalan Maharajalela branch from February 1998 to August 2003. When applying to open the current account, the plaintiff provided the defendant with, *inter alia*, the directors' circular resolution of the plaintiff dated 19 February 1998 and specimen signatures of the authorized
H signatories for the current account. On 12 August 2003, the defendant received a letter from the plaintiff informing them that there was reason to believe that the signatures of one of the authorized signatories on various cheques issued by the plaintiff had been forged. The plaintiff instructed the defendant to stop payment
I on any or all cheques issued by the plaintiff and also requested

from the defendant copies of cheques presented for payment and cleared by the defendant for the period 1 January 2003 to 31 August 2006 ("the relevant period"). The plaintiff then filed an action against the defendant for RM287,885.16 alleged to be the total sum wrongfully debited by the defendant from the said plaintiff's current account during the relevant period based on a total of 155 alleged forged cheques. The defendant bank resisted this action on the grounds that the signatures were not a forgery but was instead signed by the signatory negligently and cl. 18 of the defendant's Rules and Regulations Governing Current Accounts relieved the defendants from liability for the payment on the forged cheques.

At the trial SP1 whose signatures were alleged to have been forged was the only witness. His evidence together with the documentary evidence revealed that during the relevant period, there were only two signatories to the current account of the plaintiff. They were SP1, who was a director of the plaintiff company, and one Andondaz s/o Packiam ("Andondaz"), the manager who ran the company. SP1 claimed that a total of 155 cheques were forged by Andondaz during the relevant period and a police report was lodged. SP1 testified that Andondaz had been charged in court for the offence of cheating. He had earlier questioned Andondaz regarding the forging and this Andondaz had admitted to the forgery. SP1 alluded to the difference between his signature and the forged ones. He provided three specimen signatures in open court and also alluded to his specimen signature on the application form.

Held (allowing the plaintiff's claim with costs):

(1) Even upon a cursory examination, it was quite obvious that the signatures were different especially at the end of the forged signature. The true signatures were markedly consistent but were clearly at variance with the forged ones such that it obviated the need for expert evidence. Even taking into account the fact that signatures could differ over time in that they do become simplified, and leaving aside the question of whether the bank should have been alerted to the differences, the court had no doubt that the signatures were not that of SP1 but were forged. The court did not view SP1 as someone who would make false allegations or even be mistaken about his true signature so as to put his trusted manager Andondaz at the risk

of imprisonment if he was found guilty in the courts. If the defendant bank was right in suggesting that the signatures were indeed that of SP1, then it must mean that this was an elaborate scheme and that SP1 was a callous man. In the court's assessment, this was not the case and the court was more than satisfied that the signatures on the disputed cheques were not that of SP1. (paras 12, 12 & 14)

(2) The duty of the bank in relation to its customers' cheques is to honour its customer's cheques in accordance with its mandate on instructions. But if the customer's signature on the cheque is forged or unauthorized, s. 24 of the Bills of Exchange Act 1949 provides that the effect of a forged signature of the drawer on a cheque is to make it "wholly inoperative" unless the person is precluded from setting up forgery. At common law a customer owes his banker only two duties. The first is to refrain from drawing a cheque in such a manner as may facilitate fraud or forgery. The second is a duty to inform the bank of any forgery of a cheque purportedly drawn on the account as soon as the customer becomes aware of it. However there does not exist at common law a further duty on the part of the customer to take precautions in the general course of his business to prevent forgeries on the part of his servants. Neither is there at common law, in the absence of a contract to the contrary, a duty imposed upon the customer to inspect his periodical bank statements to ensure that his account is being properly maintained by the bank. *Lipkin Gorman (A firm) v. Karpnale* (refd); *United Asian Bank v. Tai Soon Heng Construction Sdn Bhd* (refd); *London Joint Stock Bank Ltd v. Macmillan* (refd); *Greenwood v. Martins Bank Ltd* (refd). (paras 15, 16 & 18)

(3) Clause 18 effectively reversed the onus on customers to verify their bank statements and to inform the bank of any errors. If the customer failed to do so, then he was precluded from making a claim against the bank for any loss. Clause 18 spoke only of errors. There was no reference at all to possible forgery or fraud. If it was the intention of the defendant bank to get its customers to also check for forgery, then cl. 18 was insufficient as it was far from being a clear and unambiguous provision in that respect. A customer reading cl 18 might be inclined to think that the said clause merely referred to some incorrect mathematical calculations in the account or failure to take into account legitimate credits and debits to the account

rather than the more serious matters of forgery or fraud. It was noteworthy that this clause was not some bargained arrangement between the customer and the bank but rather a term drafted entirely by the bank without any contribution by the customer. *Arrow Transfer Company Ltd v. Royal Bank of Canada* (dist); *Pertamina Energy Trading Limited v. Credit Suisse* (refd); *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* (foll), *Consmat Singapore (Pte) Ltd v. Bank of America National Trust and Savings Association* (dist). (paras 20, 21, 22, 23, 24, 25, 26 27, 28, 29 30, 31, 32, 33, 34 & 35)

(4) Although the customer was more often in a superior position to prevent the occurrence of forgery rather than the bank and banks have to contend with thousands of cheques on a daily basis, but that is the basis upon which banks have set up their business. A bank has no mandate to pay on a forged instrument of a customer. To do so would constitute a breach of a fundamental term in its relationship with its customer. If the bank wished to avoid liability arising from what really amounts to its own breach, it has the option to include express terms in its contract with its customers so as to shift the risks of forgery or fraud to the customer. The customer will then be put on notice and if he or she does not agree to such terms, then there is always the option of going to another bank with less onerous terms. Therefore, Clause 18 was not sufficiently explicit to encompass cases of forgery or fraud. It did not satisfy the "rigorous test" as laid down by Lord Scarman in *Tai Hing Cotton Mill Ltd (supra)*. Accordingly, the plaintiff's claim was allowed for the sum of RM287,885.16 together with interest and costs. (paras 36, 37 & 38)

Case(s) referred to:

Arrow Transfer Company Ltd v. Royal Bank Of Canada [1972] SCR 845 ***(dist)***

Consmat Singapore (Pte) Ltd v. Bank Of America National Trust And Savings Association [1992] 2 SLR 828 ***(dist)***

Greenwood V. Martins Bank Ltd [1933] AC 51 ***(refd)***

Lipkin Gorman (A Firm) v. Karpnale [1989] 1 WLR 1340 ***(refd)***

London Joint Stock Bank Ltd v. Macmillan [1918] AC 777 ***(refd)***

Pertamina Energy Trading Limited v. Credit Suisse [2006] 4 SLR 273 ***(refd)***

Tai Hing Cotton Mill Ltd v. Liu Chong Hing Bank Ltd [1986] 1 AC 80

United Asian Bank Bhd v. Tai Soon Heng Construction Sdn Bhd [1993] 2 CLJ 31 SC ***(refd)***

Legislation referred to:
Bills of Exchange Act 1949, s. 24
Evidence Act 1950, s. 73

For the plaintiff - M Manogar; M/s Manogar & Co
For the defendant - Nicole Wee (Ong Lee Fong with her); M/s Chooi & Co

Reported by Susheila Sreedharan

JUDGMENT

Harmindar Singh Dhaliwal JC:

[1] The issuance and payment of banking cheques is a common occurrence in the personal and commercial world. Cheques are honoured by the banks after comparing the signature on the cheque with the specimen provided to the bank. There will inevitably be cases of forged signatures. This was one such case. Invariably, the question that arises, and which is the case here, is who will bear the loss - the customer or the bank?

[2] In this case, the plaintiffs were customers of the defendant bank. They maintained a current account No. 21432540227134 ("the current account") for the period February 1998 to August 2003. This account was operated at the Jalan Maharajalela branch, Kuala Lumpur.

[3] Upon applying to open the current account, the plaintiff had provided the defendant with, *inter alia*, the directors' circular resolution of the plaintiff dated 19 February 1998 and specimen signatures of the authorized signatories for the current account.

[4] On 12 August 2003, the defendant received a letter from the plaintiff informing them that there was reason to believe that the signatures of one of the authorized signatories on various cheques issued by the plaintiff had been forged. As such, the plaintiff instructed the defendant to stop payment on any or all cheques issued by the plaintiff. The plaintiff also requested from the defendant copies of cheques presented for payment and cleared by the defendant for the period 1 January 2003 to 31 August 2006 ("the relevant period").

[5] The plaintiff then filed this action claiming from the defendant a sum of RM287,885.16 alleged to be the total sum wrongfully debited by the defendant from the said plaintiff's current account during the relevant period based on a total of 155 alleged forged cheques.

[6] The defendant bank is resisting this claim on the ground that the signatures were not a forgery but were instead signed by the signatory negligently. A further ground is that cl. 18 of the defendant's Rules and Regulations Governing Current Accounts relieves the defendants from liability for the payment on the forged cheques.

[7] The issues for determination before the court were therefore as follows:

(1) Whether the signatures on the disputed cheques were forged, and

(2) Whether cl. 18 of the defendant's Rules and Regulations Governing Current Accounts relieves the defendant from payment on the forged cheques.

Whether The Signatures On The Disputed Cheques Were Forged?

[8] It is trite that the burden of proving forgery lies on the party alleging the forgery. As for the standard of proof, the Supreme Court in *United Asian Bank Bhd v. Tai Soon Heng Construction Sdn Bhd* [1993] 2 CLJ 31 held that a customer who alleges that his banker has honoured forged cheques drawn on his account need only establish the charge of forgery on a balance of probabilities.

[9] In the instant case, the only witness who gave evidence was SP1 whose signatures were alleged to have been forged. His evidence together with the documentary evidence revealed as follows.

[10] During the relevant period, there were only two signatories to the current account of the plaintiff. They were SP1, who was a director of the plaintiff company, and one Andondaz s/o Packiam ("Andondaz"). SP1 claimed that a total of 155 cheques were forged by Andondaz during the relevant period. A police report to this effect was lodged by SP1 (exh. P1). SP1 testified that Andondaz

had been charged in court for the offence of cheating. He told the court that he knew of this because he was required to attend court as a witness. He had earlier questioned Andondaz regarding the forging and this Andondaz had admitted to the forgery. It was also in evidence that although Andondaz was an authorized signatory for the current account, he was not a director but the manager who ran the company. Andondaz was responsible for all daily company affairs including dealing with the defendant bank.

[11] With regard to the signatures, SP1 alluded to the difference between his signature and the forged ones. To this end, SP1 provided three specimen signatures in open court as permitted under s. 73 of the Evidence Act 1950. He also alluded to his specimen signature on the application form although the actual specimen card was not produced.

[12] Even upon a cursory examination, it was quite obvious that the signatures were different especially at the end of the forged signature. The true signatures were markedly consistent but were clearly at variance with the forged ones such that it obviated the need for expert evidence.

[13] In suggesting that the forged signatures could be that of SP1, reference was made to other payments made to third parties, which payments were not included in this claim. The signatures here were also at variance with the true signature of SP1. However, I think the plaintiff had sufficiently explained that he would have disputed these cheques as well if they had been made available to him at the time of filing the claim.

[14] Even taking into account the fact that signatures can differ over time in that they do become simplified, and leaving aside the question of whether the bank should have been alerted to the differences, I have no doubt that the signatures were not that of SP1 but were forged. I do not see SP1 as someone who would make false allegations or even be mistaken about his true signature so as to put his trusted manager Andondaz at the risk of imprisonment if he was found guilty in the courts. If the defendant bank is right in suggesting that the signatures are indeed that of SP1, then it must mean that this was an elaborate scheme and that SP1 was a callous man. Quite clearly in my assessment, this was not the case. I was more than satisfied that the signatures on the disputed cheques were not that of SP1.

Whether Clause 18 Of The Defendant's Rules And Regulations Governing Current Accounts Relieves The Defendant From Payment On The Forged Cheques?

[15] What is the duty of the bank in relation to its customers' cheques? May LJ in *Lipkin Gorman (A firm) v. Karpnale* [1989] 1 WLR 1340 CA characterized the duty in the following fashion (at p. 1356):

> The principal obligation is on the bank to honour its customer's cheques in accordance with its mandate on instructions. There is nothing in such a contract, express or implied, which could require a banker to consider the commercial wisdom or otherwise of the particular transaction. Nor is there normally any express term in the contract requiring the banker to exercise any degree of care in deciding whether to honour a customer's cheque which his instructions require him to pay. In my opinion any implied term requiring the banker to exercise care must be limited. To a substantial extent the banker's obligation under such a contract is largely automatic or mechanical. Presented with a cheque drawn in accordance with the terms of that contracts, the banker must honour it save in what I would expect to be exceptional circumstances.

[16] But if the customer's signature on the cheque is forged, or unauthorized, then s. 24 of the Bills of Exchange Act 1949 becomes relevant. Section 24 reads:

> 24. Forged or unauthorized signature.
>
> Subject to the provisions of this Act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorized signature is wholly inoperative, and no right to retain the bill or to give a discharge therefore or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority:
>
> Provided that nothing in this section shall affect the ratification of an unauthorized signature not amounting to a forgery.

[17] It follows therefore that the effect of a forged signature of the drawer on a cheque is to make it "wholly inoperative" unless the person is precluded from setting up forgery. The banker who pays out on a forged cheque is therefore liable to the customer for any loss incurred since for all intents and purposed the forged cheque is a nullity and there is no mandate for payment.

[18] Also in relation to the duty of a banker, the Supreme Court in *United Asian Bank v. Tai Soon Heng Construction Sdn Bhd* [1993] 2 CLJ 31 followed the Privy Council decision in *Tai Hing Cotton Mill Ltd v. Liu Chong Hing Bank Ltd* [1986] 1 AC 80 and held that at common law a customer owes his banker only two duties. The first is to refrain from drawing a cheque in such a manner as may facilitate fraud or forgery. The second is a duty to inform the bank of any forgery of a cheque purportedly drawn on the account as soon as the customer becomes aware of it. However there does not exist at common law a further duty on the part of the customer to take precautions in the general course of his business to prevent forgeries on the part of his servants. Neither is there at common law, in the absence of a contract to the contrary, a duty imposed upon the customer to inspect his periodical bank statements to ensure that his account is being properly maintained by the bank. These two duties arise from the cases of *London Joint Stock Bank Ltd v. Macmillan* [1918] AC 777 and *Greenwood v. Martins Bank Ltd* [1933] AC 51, respectively.

[19] In the instant case, it is significant that the plaintiffs have entered into a contract in the form of cl. 18 of the Rules and Regulations. Clause 18 reads as follows:

> A statement of the customer's account will be rendered once a month. Customers are asked to examine all entries in the statement as soon as possible and to report at once to the Bank any error found therein. If the customer does not respond within fourteen (14) days after the date of the receipt of the statement of account and object to any entry therein, the statement shall be treated as **conclusively settled** as between the customer and the Bank. (emphasis added)

[20] What this clause purports to do is to effectively reverse the onus on to the customers to verify their bank statements and to inform the bank if there are any errors. If the customer does not do so, then he or she is precluded from making a claim against the bank for any loss. These type of clauses are known generally as verification clauses or conclusive evidence clauses and have been accepted as valid in Canada through the Canadian Supreme Court decision in *Arrow Transfer Company Ltd v. Royal Bank of Canada* [1972] SCR 845 and in Singapore through the Court of Appeal decision in *Pertamina Energy Trading Limited v. Credit Suisse* [2006] 4 SLR 273.

[21] However, in the case of *Tai Hing Cotton Mill Ltd v. Liu Chong Hing Bank Ltd*, *supra*, the statements intended to have conclusive effect in that case were held by the Privy Council to be not sufficiently clear to bring home to the customer the importance of inspection of the statements. In particular, Lord Scarman observed as follows (at p. 109):

> Their Lordships agree with the views of the trial judge and Hunter J as to the interpretation of these terms of business. They are contractual in effect, but in no case do they constitute what has come to be called "conclusive evidence clauses". Their terms are not such as to bring home to the customer either "the intended importance of the inspection he is being expressly or impliedly invited to make," or that they are intended to have conclusive effect against him if he raises no query, or fails to raise a query in time, upon his bank statements. If banks wish to impose upon their customers an express obligation to examine their monthly statements and to make those statements, in the absence of query, unchallengeable by the customer after expiry of a time limit, the burden of the objection and of the sanction imposed must be brought home to the customer. In their Lordships' view the provisions which they have set out above do not meet this undoubtedly rigorous test. The test is rigorous because the bankers would have their terms of business so construed as to exclude the rights which the customer would enjoy if they were not excluded by express agreement. It must be borne in mind that, in their Lordships' view, the true nature of the obligations of the customer to his bank where there is not express agreement is limited to the *Macmillan* and *Greenwood* duties. Clear and unambiguous provision is needed if the banks are to introduce into the contract a binding obligation upon the customer who does not query his bank statement to accept the statement as accurately setting out the debit items in the accounts.

[22] It would therefore appear that whilst such "conclusive evidence clauses" are valid *per se* in that the bank may vary the common law duties of its customers by contract, whether such clauses in fact exclude the rights a customer normally enjoys will depend upon the peculiar facts of each case and the terms of the relevant "conclusive evidence clause".

[23] In the instant case, it is apparent that cl. 18 imposes an obligation on the customer to examine all the entries in the statements that are issued on a monthly basis. If there are errors, then the customer is under a further obligation to report to the bank within 14 days. If there is no response the statement will be treated as "conclusively settled".

[24] Now the obvious question is this - is cl. 18 wide enough to cover entries on forged cheques? In the case of *Tai Hing Ltd, supra*, the customer had accounts with three banks. A total of 300 cheques totalling HK$5.5 million were forged by the accounts clerk of the customer. Each of the three banks had the so-called conclusive evidence clauses. The first bank had the following clause:

> A monthly statement for each account will be sent by the bank to the depositor by post or messenger and the balance shown therein may be deemed to be correct by the bank if the depositor does not notify the bank in writing of any error therein within 10 days after the sending of such statement ... (at p 109).

[25] The agreement with the second bank was:

> The bank's statement of my/our account will be confirmed by me/us without delay. In case of absence of such confirmation within a fortnight, the bank may take the said statement as approved by me/us. (at p 109).

[26] And the third bank:

> A statement of the customer's account will be rendered once a month. Customers are desired: (1) to examine all entries in the statement of account and to report at once to the bank any error found therein, (2) to return the confirmation slip duly signed. In the absence of any objection to the statement within seven days after its receipt by the customer, the account shall be deemed to have been confirmed. (at p 109).

[27] As was observed earlier, the Privy Council decided that these terms were not sufficient to exonerate the bank from liability.

[28] Notwithstanding this standpoint, a divergence of views can also be found in other cases on the interpretation of similar clauses. Of note is the Singapore case of *Consmat Singapore (Pte) Ltd v. Bank of America National Trust and Savings Association* [1992] 2 SLR 828 and the Canadian case of *Arrow Transfer Co Ltd v. Royal Bank of Canada*, *supra*.

[29] In the *Consmat* case, where 15 forged cheques totalling $94,355.32 were honoured, the defendant bank relied on cl. 3(c) of the general agreement between the parties. The clause was as follows:

> I/We hereby undertake to verify the correctness of each statement of account and accompanying cheques or vouchers received from you and to inform you within seven (7) days from the receipt

> thereof of any discrepancies, omissions or debits wrongly made to or inaccuracies or incorrect entries in the account as so stated and that at the end of the said period of seven (7) days the account as kept by you shall be conclusive evidence without any further proof that, except as to any alleged errors so notified and any payments made on forged or unauthorized endorsements, the account is and entries therein are correct, and except as provided above you shall be free from all claims in respect of the account.

[30] The High Court there held that the provisions of the cl. 3(c) were wider than that in *Tai Hing Cotton Mill Ltd* and satisfied the "rigorous test" as laid down by Lord Scarman in that case.

[31] In the Canadian case of *Arrow Transfer*, 73 cheques amounting to C$165,109.03 were forged by the customer's chief accountant and office manager. The bank paid out on these forged cheques. The defendant bank relied on the following clause:

> In consideration of The Royal Bank Of Canada (hereinafter called the "Bank") opening or continuing an account with the undersigned, the undersigned hereby agrees with the Bank in respect of each account with the undersigned now or hereafter kept by the Bank at any of its branches or agencies to verify the correctness of each statement of account received from the Bank and if a statement of account and relative vouchers are not received by the 10th day after the end of each month or, if statements are not to be prepared monthly, by the 10th day after the end of the term agreed on for their preparation to obtain them from the Bank and within 30 days after the time when they should have been received to notify the Bank in writing at the branch or agency where the account is kept of any alleged omissions from or debits wrongly made to or inaccurate entries in the account as so stated and that at the end of the said 30 days the account as kept by the Bank shall be conclusive evidence without any further proof that except as to any alleged errors so notified and any payments made or forged or unauthorized endorsements the account contains all credits that should be contained therein and no debits that should not be contained there and all the entries therein are correct and subject to the above exception the Bank shall be free from all claims in respect of the account.

[32] The Supreme Court of Canada, by majority, held that the verification agreement was valid. In particular, Martland J stated (at p. 850):

> I agree with the opinions expressed in the Court of Appeal that the verification agreement provided Royal with a complete defence to the action. That agreement is a contract, defining the terms upon

which the bank continued the account of the appellant. The appellant agreed to verify each statement of account which it received from the bank, and, within the period specified, to notify the bank of any debits wrongly made in the account. At the end of the stipulated period the account as kept by the bank became conclusive evidence that it contained no debits that should not be contained in it, subject to only two exceptions:

1. Errors of which timely notice had been given to the bank;

2. Payments made on forged or unauthorized endorsement.

The debits entered in the appellant's account in respect of the forged cheques paid by Royal were "debits wrongly made". The payment was not made on a forged endorsement. Except as to the last of the 73 cheques, the appellant failed to give the required notice as to debits wrongly made. As to the first 72 cheques, the account became conclusive evidence that it contained no debits that it should not have contained, and Royal was freed from any claim in respect of them.

I do not agree with the contention that the words "debits wrongly made" do not apply in respect of a forged cheque. The obligation of the customer to give notice to the bank within the prescribed period relates to any debit wrongly made, and it is clear that it is wrong for a bank to debit a customer's account in respect of the payment of a forged cheque. In the absence of the verification agreement, a bank which debited a customer's account in respect of a forged cheque would be liable to him. The agreement furnishes some protection to the bank in that the customer must check the account and the relevant vouchers and give prompt notice if he is to enforce that liability against the bank. I see no reason to limit the meaning of the words "debits wrongly made". They apply to any debit to the account which the bank was wrong in making.

There is the further fact that the verification agreement does refer to forgery, in relation to payments made on forged endorsements. Such payments are within one of the two exceptions to the conclusive nature of the account. The fact that a specific exception was created in respect of a forgery of that kind indicates that the agreement is applicable in respect of a debit wrongly made in relation to a cheque on which the signature of the drawer is forged.

[33] The minority view was delivered by Laskin J. He did not agree that fraud or forgery came within the scope of the verification agreement. He observed as follows (at p 867):

Forgery and unauthorized debits to a customer's account owing to the forgery or fraud of third persons or of employees do not exhaust a bank's liability. There is the quite ordinary case of

> arithmetic error, or failure to credit sums to an account, of wrongful *albeit* innocent attribution of debits to an account. These are possible, even if infrequent; perhaps as infrequent as forgery and fraud. These instances of breach of obligation to a customer relate directly to what the bank has sought to achieve through the verification agreement. In my opinion, the principal question is not whether the bank has sought to protect itself against its breach of a fundamental term of its relationship with its customer, but rather what is the scope of protection which it has achieved under a document which is more a contract of adhesion than a bargained arrangement.
>
> Neither forgery nor fraud are expressed as risks of the customer. The key words are "verify the correctness" of statements of account received from the bank; "notify the bank in writing ... of any alleged omissions from or debits wrongly made to or inaccurate entries in the account". It is in respect of these, unless there is timely notice, that "the account as kept by the bank shall be conclusive evidence" that it is correct, and that, subject to what is excepted (this includes "payments made on forged or unauthorized endorsement"), the bank is to be free "from all claims in respect of the account".
>
> I find it strange that a bank which seeks by contract to throw the risk of all forged drawer signatures upon its customer should be so reticent about referring expressly to such an eventuality. It is not as if its verification form lacks subject-matter without it. The verification form, as a matter of words, encompasses the situation which arose in *Union Bank of Canada v. Wood*. Beyond this or related situations, it surely is, to say the least, "ambiguous" (to use the term applied by Duff J. in the *Stewart* case) in any suggested application to forgery or fraud. There is every reason to construe it *contra proferentem*, and I would therefore conclude that its words do not provide protection against the forgery of the drawer's signature.

[34] Coming back to cl. 18 in the instant case, I do not see how it is too different from the clauses in *Tai Hing Cotton Mill Ltd.* Clause 18 speaks only of errors. There is no reference at all to possible forgery or fraud. If it was the intention of the defendant bank to get its customers to also check for forgery, then I think that Clause 18 is insufficient as it is far from being a clear and unambiguous provision in that respect as envisaged by Lord Scarman in *Tai Hing Cotton Mill Ltd*. A customer reading cl. 18 might be inclined to think that the said clause merely refers to some incorrect mathematical calculations in the account or failure to take into account legitimate credits and debits to the account

A rather than the more serious matters of forgery or fraud. It is noteworthy that this clause was not some bargained arrangement between the customer and the bank but rather a term drafted entirely by the bank without any contribution by the customer.

B **[35]** In the *Consmat* case, there was at least a reference to cheques and "payments made on forged or unauthorized indorsements" in the so-called conclusive evidence clause. Significantly as well, the bank in Consmat adopted the practice of returning the cheques paid by the bank to the customer so that the signatures on the cheques C could be verified unlike the defendant bank in the instant case. In the *Arrow Transfer* case, the verification agreement as it was known in that case also referred to forgery in relation to payments made on forged endorsements unlike the instant case.

D **[36]** It was also submitted that the court should recognize and acknowledge the present commercial reality, business efficacy and the allocation of risks. I appreciate that the customer is more often in a superior position to prevent the occurrence of forgery rather than the bank and that the banks have to contend with thousands of cheques on a daily basis. But that is the basis upon which banks E have set up their business. A bank has no mandate to pay on a forged instrument of a customer. To do so would constitute a breach of a fundamental term in its relationship with its customer. If the bank wishes to avoid liability arising from what really amounts to its own breach, it has the option to include express terms in its F contract with its customers so as to shift the risks of forgery or fraud to the customer. The customer will then be put on notice and if he or she does not agree to such terms, then there is always the option of going to another bank with less onerous terms.

G **[37]** In the instant case and for the reasons I have stated, I do not think that cl. 18 is sufficiently explicit to encompass cases of forgery or fraud. It does not satisfy the "rigorous test" as laid down by Lord Scarman in *Tai Hing Cotton Mill Ltd*.

H **[38]** In the circumstances, the plaintiff's claim is allowed for the sum of RM287,885.16 together with interest at 8% per annum from the date of the writ of summons until realization. The plaintiff is also entitled to costs which, after hearing the parties, I assess at RM25,000.

I